

**APR 10 2006**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JUAN ACOSTA-TOVAR,

Defendant - Appellant.

No. 04-30350

D.C. No. CR-03-00256-EJL

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the District of Idaho  
Edward J. Lodge, District Judge, Presiding

Submitted April 5, 2006<sup>\*\*</sup>

Before: HAWKINS, McKEOWN, and, PAEZ, Circuit Judges.

Juan Acosta-Tovar appeals from his thirty-month sentence following his guilty-plea conviction for being a previously deported alien found in the United States in violation of 8 U.S.C. § 1326(a). We have jurisdiction pursuant to 28 U.S.C. § 1291.

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<sup>\*</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

<sup>\*\*</sup> This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Acosta-Tovar contends that the district court violated his constitutional rights by making an upward adjustment under U.S.S.G. § 2L1.2(b)(1)(C) on the basis of his prior state conviction for cocaine possession, which the district court found to be an aggravated felony. He argues that a jury should have determined the nature of this prior conviction. This contention is foreclosed by *United States v. Esparza-Gonzalez*, 422 F.3d 897, 907 (9th Cir. 2005), and *United States v. Brown*, 417 F.3d 1077, 1079-80 (9th Cir. 2005).

Because Acosta-Tovar was sentenced under the then-mandatory Sentencing Guidelines, and we cannot reliably determine from the record whether the sentence imposed would have been materially different had the district court known that the Guidelines were advisory, we remand to the sentencing court pursuant to *United States v. Ameline*, 409 F.3d 1073, 1084 (9th Cir. 2005) (en banc). *See United States v. Moreno-Hernandez*, 419 F.3d 906, 916 (9th Cir. 2005).

**REMANDED.**